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No. 04-748

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Petitioner,

v.

ADAM BARBOUR, and THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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INTRODUCTION

This case presents an opportunity for this Court to reinforce the requirement under the Spending Clause that there must be a nexus between restrictions imposed by Congress as a condition of accepting federal grants and the federal interest in the particular program. This Court should use as a benchmark its recent decisions in Tenth Amendment jurisprudence which evidence its concern that Congress not run roughshod over the states. This case also presents an opportunity for this Court to address the standards for waiver left open by earlier cases which has led to a split in the circuits: when Congress conditions the acceptance of federal funds on waiver of sovereign immunity, is that action reviewed under the more deferential standard arising out of spending clause litigation or is it reviewed under the more exacting standards involving waiver of a constitutional right, requiring a knowing and voluntary act by the state.

ARGUMENT

I. Review Should Be Granted To Maintain The Balance Of Power Between Coordinate Branches Of Government Because The Waiver Of Immunity Exceeds Congress' Power Under The Spending Clause

At issue in the determination of whether the Civil Rights Remedies Equalization Act (CRREA), 42 U.S.C. § 2000d-7, meets the requirements of *South Dakota v. Dole*, 483 U.S. 203 (1987) is the adequacy of the nexus between the purposes of the appropriations and the condition attached by Congress, here the waiver of Eleventh Amendment immunity. There is no question that by prohibiting discrimination in activities receiving federal funds, the CRREA promotes a federal

interest. Barbour's Opposition to Petition (hereafter Opposition) at 9; Brief of United States at 8. But that is not all that is required under *Dole*. Although this interest suffices to meet the first requirement of *Dole*, that Congress legislate in pursuit of the general welfare, this does not satisfy the third requirement, that the restriction be related "to the federal interest in particular national projects or programs." Respondents offer nothing other than argument to support their claim that establishing monetary remedies for employment discrimination claims is related to the federal interest in transit appropriations.[1] To the contrary, Judge Sentelle, dissenting below, observed that "requiring WMATA to pay money damages for such discrimination affirmatively depletes its transportation balance" (App. 29a n.4), suggesting that creation of a damages remedy is not congruent with the purpose of the appropriation.

Although respondent Barbour takes pains to trace the source of WMATA's federal appropriations, noting that under 49 U.S.C. § 5307, WMATA may use capital grants for preventive maintenance (Opposition at 2-3), respondents ignore the specific requirements imposed upon grantees such as WMATA by § 5307. Transit grantees are required to make ten separate certifications, including a certification that during non-peak hours, the elderly and handicapped need only pay a reduced fare. § 5307(d)(1)(D). Nothing requires that grantees assure that handicapped employees be given the right to bring suits for damages. Congress made specific findings that the purpose of the mass transportation section was "to provide financial assistance to State and local governments and their authorities

1. Contrary to the suggestion in respondent Barbour's Opposition, WMATA does not argue that the federal interest must be evidenced by language in a particular appropriations bill. Opposition at 7. WMATA simply urges this Court to find that the federal interest must be demonstrated by more than mere conjecture.

to help carry out national goals related to mobility for elderly individuals, individuals with disabilities, and economically disadvantaged individuals." 49 U.S.C. § 5301(f)(4). Congress made no findings that it intended to assure that national goals related to mobility include creation of a cause of action for damages for alleged victims of employment discrimination. In fact, §§ 5301 and 4307 are devoid of references to employees.

Lau v. Nichols, 414 U.S. 563, 569 (1974) and *Grove City College v. Bell*, 465 U.S. 555, 575-76 (1984), relied upon by both respondents, support no more than the unremarkable proposition that Congress may use its spending power to condition receipt of federal monies upon the recipient's compliance with federal statutory and administrative directives. In *Lau*, suit for injunctive relief was brought against local school board officials to enforce the provisions of federal regulations requiring affirmative action to prevent national origin discrimination against children who speak foreign languages. Therefore, *Lau* did not involve the issue of Eleventh Amendment immunity. The issue was whether the federal regulations were issued in accordance with the applicable statute, an entirely different question from that presented here. Likewise, in *Grove City*, there was no Eleventh Amendment issue where the Court rejected a challenge to a prohibition on sex discrimination brought by a private, coeducational, liberal arts college. Its precedential value is even more attenuated, because it did not concern a public entity and because the issue of conditioned federal assistance was discussed only briefly in the context of the First Amendment challenge. Therefore, *Lau* and *Grove City* shed little light on the analysis of the particular requirements necessary to establish a valid exercise of Congress' power to

impose requirements on states under the Spending Clause.[2] The fact that *Lau* and *Grove City* both involve non-discrimination provisions is of no consequence, because WMATA does *not* challenge the applicability of the substantive provisions of the Rehabilitation Act, only the right of individuals to seek money damages against it. As *Alden v. Maine*, 527 U.S. 706, 759 (1999) recognizes, states are still obligated to follow the dictates of federal law, even if the Eleventh Amendment is a bar to suit against the state under a federal civil rights statute.

Finally, both decisions precede *Dole* and *New York v. United States*, 505 U.S. 144 (1992), which reflect this Court's heightened concern regarding the limits on Spending Clause powers.[3] WMATA does not dispute that Congress can direct grantees to comply with conditions. Indeed, WMATA has done so in implementing a reduced fare program for the elderly and handicapped as Congress directed in § 5307. However, the waiver requirement does not satisfy the third element of *Dole*.

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2. Similarly, *United States v. American Library Association*, 539 U.S. 194 (2003), relied upon by respondent Barbour, is of minimal relevance. Although it is a Spending Clause decision, it involves *Dole*'s final requirement, that the obligation adopted by Congress may not violate any independent constitutional provision. No such claim is made here.

3. The District of Columbia Circuit previously characterized *Lau* as having issued at a time when this Court had not begun to articulate the boundaries of Congress' discretion under the Spending Clause. *State of Oklahoma v. Schweitzer*, 655 F.2d 401, 406 (D.C. Cir. 1981).

II. This Court Should Resolve The Split In The Circuits Regarding The Standards For Waivers Of Immunity In Accepting Grants

This Court should grant WMATA's petition in order to clarify that waiver of immunity by a state is only effective if the recipient has acted knowingly. The most recent decision of this Court which interpreted the remedies available under the Rehabilitation Act, *Barnes v. Gorman*, 536 U.S. 181 (2002),[4] is almost completely ignored by respondents. In *Barnes*, in finding that punitive damages were not available to plaintiffs suing for Rehabilitation Act violations, the majority found that "the contractual nature of Spending Clause legislation has implications" in construing the relief available. There this Court emphasized that the legitimacy of Congress' power under the Spending Clause rests on voluntary and knowing acceptance by the recipient. *Id.* at 186. The Second Circuit in *Garcia v. SUNY Health Sciences Ctr.*, 280 F.3d 98, 114 (2d Cir. 2001) anticipated the decision in *Barnes* in holding that waiver is ineffective unless the state has made a knowing and intentional waiver. This Court should essentially find that WMATA did not promise to waive

4. The United States argues that *Lapides v. Board of Regents*, 535 U.S. 613 (2002) is controlling. Brief of United States at 12. *Lapides* is easily distinguished because it involved affirmative conduct on the part of the state. The Supreme Court reaffirmed the existing rule regarding voluntary invocation of federal jurisdiction to avoid "the problems of inconsistency and unfairness that a contrary rule of law would create." *Id.* at 622. As respondent Barbour recognizes, the issue here is the scope of the remedy available to disgruntled employees (Barbour Brief at 4), since there is no question that injunctive relief is available under *Ex Parte Young*, 209 U.S. 123 (1908). *Barnes* is far more probative because, like the case at hand, it involves an inquiry into the clarity of statutory language whereas *Lapides*' sole focus is on the affirmative conduct of the state.

its immunity because the state of the law in April 1998 indicated that by adopting the CRREA, Congress had already abrogated the states' immunity. WMATA does not suggest that courts should inquire into its subjective state of mind but urges that the test be similar to the test for qualified immunity. (Pet. for Cert. at 21). This case is an optimal vehicle to assess the requirements of a knowing waiver, because WMATA eschews reliance on its subjective state of mind and focuses exclusively on a reasonable assessment of the state of the law in 1998, at the time Mr. Barbour was terminated.

In rejecting the requirements of a "knowing" waiver,[5] the United States looks to the actions of criminal defendants in waiving their constitutional rights. Brief of United States at 10. Such reliance is at odds with the narrow construction of waivers of immunity and ignores the requirement that "every reasonable presumption against waiver is to be indulged." *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expenses Bd.*, 527 U.S. 666, 682 (1999). This Court has been reluctant to find a waiver because it recognizes that what is at stake is the balance between federal and states rights. *Alden v. Maine*, 527 U.S. 706 (1999) and *Atascadero v. Scanlon*, 473 U.S. 234, 238-39 (1985).

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5. The United States errs when it asserts that Petitioner does not dispute that it was "put on clear notice of the conditions Congress placed on those funds." Brief for United States at 5 n.1. Respondent Barbour correctly characterizes WMATA's argument that it did not make a knowing waiving, "with WMATA claiming now that its receipt of federal funds in 1998 could not be knowing because the 'abrogation language' of the CRREA" led it to believe it had no immunity to waive. Opposition at 7 n.2.

Although WMATA relies upon the principle enunciated in *Garcia*, that a knowing waiver could not be made where a state could reasonably conclude that Congress has already abrogated state immunity, WMATA does not follow the lead of the Second Circuit in relying upon the abrogation provision of the ADA. 42 U.S.C. § 12202. Instead, WMATA argues that until this Court ruled that Congress lacked the power to abrogate states' Eleventh Amendment immunity in *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), WMATA reasonably believed that the CRREA had abrogated its immunity and that in applying for grants it did not face the decision of whether to waive its immunity. Numerous federal cases decided prior to *Garrett* held that the CRREA was an abrogation statute.[6] When this Court first discussed the CRREA, in *dicta* in *Dellmuth v. Muth*, 491 U.S. 223, 229-30 (1989), it interpreted the CRREA as an abrogation statute. Thus it was entirely reasonable, beginning in 1986 when the CRREA was adopted, for WMATA to understand that Congress had abrogated, i.e. taken away, its immunity. In fact, the United States notes that "under any reasonable interpretation of the statute [the Rehabilitation Act] as a whole" Congress was attempting to abrogate the rights of states which accepted federal financial assistance. Brief of United States at 17 n.8.

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6. *Reickenbacker v Foster*, 274 F.3d 974, 977 and n.11 (5th Cir. 2001); *Kilcullen v. New York State Dep't of Labor*, 205 F.3d 77, 79-80, 82 (2d Cir. 2000); *Sandoval v. Hagan*, 197 F.3d 484, 493, n. 5 (11th Cir. 1999), *rev'd on other grounds*, 532 U.S. 275 (2001); *Middlebrooks v. University of Maryland at College Park*, 980 F. Supp. 824, 827-28 (D. Md. 1997), *aff'd*, 166 F.3d 1209 (4th Cir. 1999); *Grimes v. Sobol*, 832 F. Supp. 704, 707 (S.D.N.Y.1993), *aff'd*, 37 F.3d 857 (2d Cir. 1994); *United States ex rel. Moore v. University of Michigan*, 860 F. Supp. 400, 404 (E.D. Mich. 1994); and *Alaska Cargo Transport, Inc. v. Alaska R.R. Corp.*, 834 F. Supp. 1216, 1223 (D. Alaska 1991).

Until 2001, when *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), was decided, there was a great deal of uncertainty among the lower courts as to the state of the law. Contrary to respondents' arguments, it was not clear that Congress' lacked the power to abrogate state immunity from employment claims arising under the ADA or the Rehabilitation Act. The holding of *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), that states were not amenable to suit under the Age Discrimination in Employment Act (ADEA), did not resolve all questions regarding the viability of the Eleventh Amendment defense against claims of disability discrimination. In *Cisneros v. Wilson*, 226 F.3d 1113 (10th Cir. 2000), which was decided in light of *Kimel*, the court held that ADA claims were not barred by the Eleventh Amendment. The *Cisneros* court noted that after *City of Boerne v. Flores*, 521 U.S. 507 (1997), most appellate courts which had applied the "congruence and proportionality test" to the ADA concluded that the ADA validly abrogated state Eleventh Amendment immunity. In *Garrett*, this Court granted review to resolve a split among the circuit courts on the question of whether an individual could sue a State for money damages in federal court under the ADA. 531 U.S. at 363.

The court below erred in finding that WMATA's posture in an Age Discrimination in Employment Act case undermined its ability to invoke the *Garcia* rationale. The fact that WMATA was aware of the emerging jurisprudence and as early as 1997 asserted an Eleventh Amendment defense to ADEA claims is irrelevant to whether it made a knowing decision in regard to waiving its immunity from handicap discrimination claims. At the time, it seemed more likely that this Court would find that these claims had been successfully abrogated. *See Kimel v. Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1998), where the deeply divided Eleventh Circuit found that Congress had

successfully abrogated state immunity for ADA claims, but not for ADEA claims. Indicative of this thinking, and far more compelling than WMATA's conduct in an ADEA case, is the fact that although WMATA filed a Motion to Dismiss the Amended Complaint in the instant case on May 16, 2000, asserting its immunity from claims arising under a District of Columbia statute, WMATA did not then assert that it was immune from the ADA or Rehabilitation Act claims.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari.*

Respectfully submitted

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